

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
	)	
Improving Competitive Broadband Access	)	
to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	
	)	
	)	

**REPLY COMMENTS OF HUBACHER & AMES, PLLC**

Art Hubacher  
Managing Partner  
Hubacher & Ames, PLLC  
11350 Random Hills Drive  
Suite 800  
Fairfax, VA 22030

## **SUMMARY**

Hubacher & Ames, PLLC hereby recommends that the Commission refrain from proposing any rules or regulations that would upend the contractual arrangements that are routinely entered between broadband service providers and MTE owners. There is a distinct lack of empirical data that demonstrates these contractual arrangements negatively impact the choice of broadband services to residents of MTEs. Instead, there is evidence that demonstrates these contracts have helped foster a robust free and open market that has resulted in improved broadband competition and improved customer service for residents of MTEs. Specifically, the Commission should refrain from prohibiting or interfering with exclusive wiring and marketing arrangements. Such rules would harm consumers and discourage broadband infrastructure investments.

## TABLE OF CONTENTS

	<u>Page</u>
Summary	i
I. Introduction	1
II. There is a Lack of Data to Support any Commission Intrusion in the Free Market	3
III. Exclusive Wiring Arrangements Do Not Foreclose Competition in MTEs	4
IV. Banning Exclusive Wiring Arrangements Would Harm Consumers and Lead to Decreased Broadband Infrastructure Investment	7
V. Exclusive Marketing Arrangements are Not a Barrier to Entry	10
VI. Revenue Sharing Arrangements are Standard Business Practices That Encourage Broadband Investments	12
VII. Conclusion	14
Appendix One (New Build Projects January 2017 - July 2017)	18
Appendix Two (Fiber Overbuild Contracts at Existing Assets July 2016- July 2017)	20
Appendix Three (Declaration of Kevin Hott, E&S Ring Management Corporation)	22

## I. INTRODUCTION

HUBACHER & AMES, PLLC (“H&A”) hereby submits these Reply Comments in the above-captioned Notice of Inquiry (“NOI”) in the above referenced docket.<sup>1</sup> H&A strongly supports the comments filed by the National Multifamily Housing Council (“NMHC”),<sup>2</sup> NTCA<sup>3</sup>, and RealtyCom Partners<sup>4</sup> and others who encourage the Commission to refrain from imposing unnecessary regulations that will undermine the competitive balance of a market which is successfully bringing choice to residents of MTEs. H&A strongly opposes the comments filed by those parties who are urging the Commission to impose unnecessary new regulations that would benefit certain service providers but diminish the broadband service choices and quality of services for residents of MTEs. Most of these comments are filled with conclusory statements and inaccuracies that are not backed by any quantitative data and do not reflect the reality of the market.

H&A represents a variety of real estate clients in the multi-family housing and commercial sectors, providing counsel on issues involving the deployment and implementation of broadband, telecommunications, cable, data and information services in the real estate sector. H&A’s clients include some of the nation’s largest developers, real estate investment trusts, and property management groups with portfolios that

---

<sup>1</sup> *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, GN Docket No. 17-142, FCC 17-78 (rel. June 23, 2017) (“NOI”)

<sup>2</sup> See Comments of National Multifamily Housing Council, *Notice of Inquiry*, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN Docket 17-142 (filed July 24, 2017).

<sup>3</sup> See Comments of NCTA, *Notice of Inquiry*, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN DOCKET 17-142 (FILED JULY 24, 2017).

<sup>4</sup> See Comments of RealtyCom Partners, *Notice of Inquiry*, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN DOCKET 17-142 (FILED JULY 24, 2017).

include hundreds of properties with tens of thousands of residential units. H&A also represent smaller MTE owners and managers, some of whom own or manage only one individual property, as well homeowner associations and condominium associations.

Although we are a small firm, H&A has been named as one of “The Top 100 MDU Technology Providers” by Broadband Communities magazine for the past five consecutive years.<sup>5</sup> We specialize in representing our real estate clients in drafting and negotiating agreements with a wide variety of service providers that set forth the terms and conditions of the deployment of broadband services to residents of our client’s MTEs. These agreements include access agreements, license agreements, easements, marketing agreements, rooftop leases for wireless carriers, and similar contracts that are routinely entered between broadband service providers and MTE owners or managers (hereinafter, collectively “MTE Owners”). In 2016, H&A negotiated more than 500 contracts covering both new and existing MTE projects. These Reply Comments are based on H&A’s experience in negotiating the type of contracts at issue in this proceeding.

---

<sup>5</sup> See Broadband Communities Magazine: October 2012 (Vol 33, No. 6), October 2013 (Vol. 34, No.6), October 2014 (Vol. 35, No. 6), October 2015 (Vol. 36, No. 6), and October 2016 (Vol. 37, No. 6).

## **II. There is a Lack of Data to Support any Commission Intrusion in the Free Market**

Commenters such as Incompas argue that “Residents of MDUs often have little choice when it comes to selecting a communications provider.”<sup>6</sup> However there is a dearth of data provided by these commenters. The lack of statistics is telling. These commenters are taking the approach that if this blanket statement is repeated often enough, the Commission will treat it as a fact. We urge the Commission not to accept this conclusion.

In most cases, residents of the MTEs that our clients develop and own have a number of quality broadband service choices. Appendix One attached hereto lists the new build projects that H&A has completed through the first seven months of 2017. Of more than 50 projects, there will be two or more choices of broadband providers available to residents when the MTE opens in approximately 75% of the projects.<sup>7</sup>

Appendix Two attached hereto lists more than 40 existing MTEs where a service provider has committed to perform a fiber “overbuild” over the twelve month period that ended in July 2017. Once those overbuilds are completed, residents of these MTEs will have access to improved broadband speeds and services (and in many cases, an additional service provider option).

---

<sup>6</sup> See Comments of Incompas, *Notice of Inquiry*, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN Docket 17-142 (filed July 24, 2017).

<sup>7</sup> The majority of the MTEs with only a single provider are student housing or senior housing projects that will obtain service pursuant to a bulk contract. It is not unusual for such specialized MTEs to open with only one provider serving the MTE on a bulk basis

The market in which providers negotiate with MTE Owners to bring quality broadband services to residents is robust. As described in more detail in Section IV below, these negotiations cover many areas and result in contracts that have improved broadband services for MTE residents. Yes - there are underserved MTEs, including many low-income projects where new, competitive service providers are unwilling to make investments. However, rather than imposing unnecessary regulations, the Commission should investigate why certain providers are tripping over themselves to gain access to certain high-income MTEs (which may already have two or three service options) while ignoring those MTEs with lower-income residents (which may only have one service option).

The broad intrusive rules suggested by commenters like Incompas, Public Knowledge, and the ILSR/Next Century Cities will not solve any identifiable problem. There is no hard data presented that demonstrates there is an overall shortage of choices at most MTEs. There is no compelling interest on the line. What these commenters are asking for is extraordinary governmental relief: Rules to make it cheaper for them to gain subscribers at MTEs that they pick and choose. This is both unnecessary and ultimately harmful to MTE residents.

### **III. Exclusive Wiring Arrangements Do Not Foreclose Competition In MTEs**

H&A's clients recognize that in today's digital age, residential and commercial tenants require and expect high quality broadband services, and to that end our clients regularly work with multiple providers to deliver high-quality competitively-priced

communications service options to their residents. Contrary to what some commenters would have the Commission believe,<sup>8</sup> our clients rarely limit their residents' choice of broadband providers to a single service provider. In fact, the opposite is true. Our clients are constantly seeking out opportunities to improve resident choices. And, as the data in Appendix One and Appendix Two reflects, they are often successful in giving residents a choice by engaging in open free market contract negotiations with multiple providers.

MTE Owners routinely enter into exclusive wiring arrangements with service providers for reasons unrelated to limiting choice, such as obtaining a commitment from the provider to perform upgrades, repairs and routine maintenance of the wiring. Exclusive wiring contracts typically only cover certain specific elements of inside wiring that is owned by the MTE Owner. In H&A's practice, most exclusive wiring provisions cover only designated "home-run" wiring that extends to – but not within – residential units. Except in bulk contracts, it is increasingly rare for a service provider to have exclusive use of the "home wiring" within the residential units.

Commenters such as Incompas encourage the Commission, without providing any supporting data, to prohibit contracts that allow a service provider to have exclusive access to wiring owned by the MTE Owner.<sup>9</sup> Others support the framework of San Francisco's Ordinance 52 that would require MTE Owners to grant access to owner-owned wiring to a service provider even if the MTE Owner has no contractual

---

<sup>8</sup> See e.g. Comments of Incompas, *Notice of Inquiry*, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN DOCKET 17-142 at pp. 13-16 (filed July 24, 2017); Comments of The Institute for Local Self-Reliance and Next Century Cities, *Notice of Inquiry*, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN DOCKET 17-142 at pp. 3-4 (filed July 24, 2017).

<sup>9</sup> See Comments of Incompas, *Notice of Inquiry*, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN DOCKET 17-142 at p. 14 (filed July 24, 2017).



arrangement with that provider.<sup>10</sup> We strongly encourage the Commission to reject these requests.

As reflected by the data set forth in Appendix Two, a contract that allows for one provider's exclusive use of certain wiring owned by the MTE Owner does not prevent another service provider from deploying its service to the residents of the MTE via its own wiring or via a second run of wiring owned by the Owner. Of the existing MTEs listed on Appendix Two where a service provider is committed to perform a fiber overbuild), more than 90% of those properties had contracts that gave another service provider exclusive use of owner-owned wiring. Those exclusive wiring arrangements did not prevent competition at these properties. The providers who are performing the fiber overbuilds invested in new infrastructure at these properties to improve their services. These type of additional infrastructure investments, especially upgrades to fiber, should be encouraged by the Commission. A rule that would ban an MTE Owner from giving a service provider exclusive usage rights to Owner-owned wiring would encourage the sharing of old, outdated infrastructure and discourage fiber overbuild deployments.

There is no one-size fits all solution to arrangements for inside wiring. Providers like AT&T and Verizon typically insist on installing and owning their own wiring or fiber lines all the way to the residential units. In other cases, the MTE Owner will own the wiring and grant a service provider either an exclusive or non-exclusive right to use the owner-owned wiring. Sometimes the Owner will provide dual sets of wiring so that two providers can each have exclusive use of a "designated" run of wiring. In other situations, the parties have negotiated and entered contracts with service providers that permit

---

<sup>10</sup> See Comments of NetMoby, Inc., *Notice of Inquiry*, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN DOCKET 17-142 at p.10 (filed July 24, 2017).

multiple providers to share one set of owner-owned wiring, typically with the inclusion of some type of “neutral box” facility that allows for managed sharing of the wiring. In all of these examples, the MTE Owner and the service provider(s) were able to reach an agreement that was tailored to a specific MTE and designed to ensure that residents received the best quality service. This is the best process and method for delivering quality broadband services to MTE residents: open market negotiations about wiring installation and usage. There is no need for the Commission to regulate in this area. In fact, there are strong reasons why the Commission should not interfere.

#### **IV. Banning Exclusive Wiring Agreements would Harm Consumers and Lead to Decreased Broadband Infrastructure Investment**

Exclusive wiring agreements establish clear and specific responsibilities and obligations pertaining to the service provider’s use, maintenance, repair, and upgrade of wiring owned by the MTE Owner – all of which directly impact the quality of service residents receive. In these contracts, the MTE Owner – rather than the service provider – owns the wiring that extends to and within the residential units. These exclusive wiring provisions are not universally used in service contracts at MTEs. Some providers who install fiber directly all the way to the residential units, such as AT&T and Verizon, almost universally own and control all such wiring under the terms of their service contracts with MTE Owners.

H&A supports the comments of the NCTA that describe the benefits to MTE residents of exclusive wiring contracts.<sup>11</sup> Exclusive wiring contracts make it possible for

---

<sup>11</sup> See Comments of NCTA – The Internet and Television Association, *Notice of Inquiry*, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN Docket 17-142 at pp 4-5 (filed July 24, 2017).

MTE Owners to guarantee effective maintenance and repair of inside wiring by including contract provisions that obligate service providers to perform these tasks and meet certain service level agreements (“SLAs”) designed to ensure residents of MTEs receive timely customer service when wiring problems arise. Without exclusive use of wiring, service providers are not willing to take on repair and maintenance obligations since the wiring could be damaged by another provider who is also using the same wiring. That would be a great disservice to residents of MTEs.

A ban on exclusive wiring arrangements would open the door to unmanaged, shared use of owner-owned wiring as required by the City of San Francisco recently enacted under Ordinance 52.<sup>12</sup> H&A supports the comments of others who believe that this is bad policy and could result in litigation for an unconstitutional “taking” of the MTE Owner’s private property.<sup>13</sup> Shared use of wiring that is not managed properly clouds the responsibilities of which party is responsible for damage caused by one of the providers. This lack of clarity with respect to wiring maintenance and repair obligations could create a host of problems that negatively impact service quality, as well as the integrity of the wiring itself. At the very least, disputes regarding maintenance and repair obligations would delay necessary maintenance and repairs. If service to a resident is disrupted in a shared, unmanaged wiring situation, the MTE Owner has no contractual recourse to ensure the wiring is properly and promptly repaired so as to minimize the interruption of a resident’s service.

---

<sup>12</sup> Article 52 of the San Francisco Police Code, Ordinance No. 250-16 (“Article 52”)

<sup>13</sup> See *Petition of Multifamily Broadband Council (“MBC”) Seeking Preemption of Article 52 of the San Francisco Police Code*, MB Docket No. 17-91 (filed Feb. 24, 2017) (“Preemption Petition”)

MTE Owners have a long track history of situations where multiple providers using the same wiring have not worked well together to benefit residents. Those commenters who urge the Commission to adopt a rule similar to San Francisco's Ordinance 52 are naïve to think that competitive providers will cooperate with each other in a situation where they each have unfettered and unmanaged access to owner-owned wiring. Owner-owned wiring is not a part of a provider's network and, without the contractual maintenance and repair obligations that accompany exclusive wiring provisions, a provider has little incentive to make timely repairs or handle third-party owned wiring with the same care it uses in protecting its own network facilities. The concept that multiple providers can be given unmanaged access to one set of wiring owned by the MTE Owner is a recipe for an ugly situation that will harm consumers.

The difficulties that result from shared wiring are described in the attached Declaration of Kevin Hott, the Director of Information Systems & Technology for E&S Ring Management Corporation, an owner and manager of MTEs (see Appendix C). In the example provided by Mr. Hott, the MTE Owner made a large investment to accommodate the shared use of wiring among two different providers. Even in this managed situation in which the MTE Owner went to great lengths to avoid wiring problems, the providers are unwilling or unable to co-exist without incident. Fortunately for E&S Ring, the MTE Owner had contracts with each of the providers, and those contracts contained adequate protections to help keep the situation from causing severe hardships for the residents.

In addition to the benefits for consumers, exclusive wiring agreements encourage MTE Owners to invest in broadband infrastructure. Broadband investment is a critical policy goal of the Commission. However, MTE Owners must control that investment by

deciding who gets to use such wiring and under what terms, if there is to be an investment in the first place. If new regulations make it impossible for MTE Owners to control their own wiring, it follows that MTE Owners will be discouraged from making those types of investments.<sup>14</sup> An MTE Owner who installs wiring that it is forced to share with any provider will question the utility of that investment. Instead of encouraging investment in broadband infrastructure, a regulation that restricts MTE Owners and service providers from entering exclusive wiring contracts will have the opposite impact.

## **V. Exclusive Marketing Arrangements Are Not A Barrier to Entry**

Some commenters are urging the Commission to review and potentially prohibit exclusive marketing agreements.<sup>15</sup> Once again, there no quantitative data to support such a move. Exclusive marketing agreements do not prohibit competitors from providing service in an MTE. Nor are they prevalent in MTEs. Although a particular service provider may, for any number of reasons, prefer to have an MTE Owner assist the provider in marketing its service, such marketing assistance is not required for a service provider to provide service to residents in an MTE.

Appendix One and Appendix Two lists the type of contracts that our clients have entered into with various service providers. Some of these contracts convey access rights to the Property with no marketing rights (“Access Only” or “AO”); others include non-exclusive marketing rights for the service provider (“NEMA”); and a handful include exclusive marketing rights for the service provider (“EMA”). Of the 55 new build MTE

---

<sup>14</sup> See *Reply Comments of Essex Property Trust, Inc. regarding Petition of Multifamily Broadband Council (“MBC”) Seeking Preemption of Article 52 of the San Francisco Police Code*, MB Docket No. 17-91 at pp 2-3 (filed June 7, 2017).

<sup>15</sup> See *Comments of Incompas, Notice of Inquiry, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket 17-142 at pp 16-19 (filed July 24, 2017).

projects set forth on Appendix One, only 11 were EMA contracts. Of the 42 existing MTE projects listed on Appendix Two, only 4 of the new fiber overbuild contracts were EMA contracts.

And our data shows that where EMAs do exist, they do not pose a barrier to entry. Of those 11 new build projects listed on Appendix One where EMAs were entered, 6 will have service available to residents from other providers who are willing to build out facilities on an “Access Only” basis. Often the reason a new build MTE opens with only one provider available is because no other providers were available in the geographic area. Of the 5 new build MTEs listed on Appendix A with an EMA where only one service provider will be available when the property opens, the owners of 3 of those MTEs negotiated language in the EMA that allows a conversion to non-exclusive marketing if any other service provider becomes available and requests some type of marketing rights to justify its investment at the MTE. This type of contractual flexibility allows MTE owners to react to a changing market in order to facilitate future broadband service choices for residents.

Likewise, as listed on Appendix Two, various service providers have agreed to make the costly investment to perform fiber overbuilds on an “Access Only” basis to 11 existing properties. That so many service providers are willing to invest at properties and enter contracts with MTE Owners on an “Access Only” basis conclusively demonstrates that exclusive marketing contracts do not pose a barrier to entry for competitive service.

Moreover, EMAs with one provider do not prevent a competitive service provider who serves the MTE on an “Access Only” basis from doing its own marketing and outreach to residents. An EMA only prevents the MTE Owner from providing marketing assistance to a competitor or allowing the competitor to perform marketing events on site. Those

restrictions are not disabling. It would be impossible for an MTE Owner to restrict the type of marketing the competitive provider does on its own- including advertising online, direct mail, in newspapers, or with television or radio stations. As the Commission found in 2010, “The balance of consumer harms and benefits for marketing exclusivity is . . . significantly pro-consumer.”<sup>16</sup>

## **VI. Revenue Sharing Arrangements are Standard Business Practices That Encourage Broadband Investments**

Contracts between MTE Owners and service providers include many provisions, including, but not limited to: the allocation of each party’s responsibility for supplying/installing materials (conduit, fiber, wiring, electronics, wireless access points, etc.); the specific access right granted to the provider (license, easement); the time frame for the deployment of the provider’s services; the rights and obligations of the provider to use, repair and maintain wiring and other equipment provided by the MTE Owner; customer service standards (SLAs) that the provider must meet to ensure residents receive high quality customer service; the obligation of each party to repair damage it causes to the other party’s property; insurance requirements; the impacts of a casualty to the MTE; the impacts of the sale of the MTE to a third party; provisions addressing a change in ownership of the MTE or the service provider; the provider’s right, if applicable, to market its services on site at the MTE, and many unique issues that may impact a specific MTE.

---

<sup>16</sup> See *Second Report and Order in the matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 25 FCC Rcd 2460 (2010)

Over time, these contracts have become more sophisticated and more granular as the demand for high quality broadband services has skyrocketed. These contracts, especially in new build situations, often require the MTE Owner to make a significant investments in supplying and/or installing materials such as conduit, wiring, micro-duct, wiring panels, and electrical facilities for a service provider to use. As evidenced by the large number of MTEs that are now served by multiple providers,<sup>17</sup> MTE Owners often have to incur these costs for three or four service providers at a single MTE. These costs can be substantial.

In some contracts (especially bulk service contracts at student housing properties), the MTE Owner will pay the service provider a construction fee that can cost hundreds of thousands of dollars.<sup>18</sup> However, in other situations, the parties negotiate provisions that allow the MTE Owner to recoup some of these construction costs. In some instances, the service provider will reimburse the MTE Owner for wiring or other facilities the owner has purchased and installed. In other cases, the MTE Owner is compensated in the form of revenue share arrangements.

H&A strongly disagrees with comments of Incompas that these revenue share arrangements are equivalent to a “bounty” or a “kickback” or some type of illegal “payola.”<sup>19</sup> Those terms are sensational, misleading and do not promote a serious discussion of the issues raised by the NOI. The use of these terms also reflects the commenter’s lack of understanding of the role of contracts in a free market. The correct

---

<sup>17</sup> See Appendix One and Appendix Two of these Reply Comments.

<sup>18</sup> These construction fees can be quite costly for the MTE Owner. In one recent contract negotiated by H&A, the MTE owner paid a construction sum in excess of \$560,000 to a service provider at a student housing property in Syracuse, NY.

<sup>19</sup> See Comments of Incompas, *Notice of Inquiry*, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN Docket 17-142 at pp 9-10 (filed July 24, 2017).



term to describe the revenue share paid by a service provider pursuant to a service contract with an MTE Owner is “consideration.”<sup>20</sup> Consideration is a basic element of any contract and the Commission should avoid taking any action that disrupts standard contractual terms. Revenue share is nothing more than a type of consideration that is negotiated to help the owner offset the considerable costs to bring high quality broadband service to its residents.

Owners who are prevented by a governmental restriction from receiving consideration will naturally look to cut costs by reducing infrastructure investment or by raising rents. A restriction against revenue share would have the same impact as a restriction on exclusive wiring contracts: MTE Owners will be discouraged from making investments in broadband infrastructure if they are unable to recoup at least some of their costs through contract negotiations. This is a result the Commission should seek to avoid.

## **VII. Conclusion**

The Commission should reject the calls from commenters such as Incompas and Public Knowledge for the Commission to impose restrictions on the type of business arrangements and contracts typically entered by and between MTE Owners and service providers. There is no quantitative data to support any finding that these traditional arrangements have resulted in a lack of competitive broadband choices for residents of MTEs. To the contrary, H&A’s practice data indicates that residents of many MTEs have more choices than ever.

---

<sup>20</sup> Black’s Law Dictionary defines the term “consideration” to be “the inducement to a contract.”

The solutions offered by Incompas and Public Knowledge to overturn established and successful business arrangements (such as the suggested prohibition of exclusive wiring and marketing contracts) are nothing more than a thinly-veiled effort to allow a certain class of service providers to avoid making the same investments made by MTE Owners and other service providers. Even worse the governmental intrusion in the marketplace urged by these apparently underfunded providers (or those who are pretending to be underfunded) would allow them to: (a) piggy-back off the investments of others (particularly wiring investments of MTE Owners), and (b) disrupt the routine business arrangements that these providers simply choose not to participate in or compete for (marketing arrangements). These providers would rather seek governmental help than make investments in their own infrastructure (e.g. wiring within an MTE) or participate in the type of free market contract negotiations with MTE Owner that have proven successful in the increased deployment of broadband services to MTEs. The Commission should not reward these providers by enacting new rules that would solve no discernable data-driven problem but that would interfere in a working free market.

This conclusion does not mean that there is nothing the Commission might do. For a variety of reasons, a number of MTEs are served by only one service provider. As some commenters have noted, many underserved MTEs are low-income housing projects where providers are reluctant to make an investment because of concerns about low returns.<sup>21</sup> H&A would urge the Commission to explore carefully-crafted solutions that would help improve a resident's ability to obtain broadband services at these communities. For example, if residents at a particular MTE have only one choice (and if

---

<sup>21</sup> See *Comments of RealtyCom Partners regarding Petition of Multifamily Broadband Council ("MBC") Seeking Preemption of Article 52 of the San Francisco Police Code*, MB Docket No. 17-91 (filed May 17, 2017).

the Owner is not providing a certain level of broadband service as an amenity pursuant to a bulk contract, rules could be crafted to protect those residents – for example rules that the sole provider serving the MTE relax credit qualifications so that, at least a low-cost service plan will always be available to residents of the MTE.

However, the sweeping governmental intrusion in the free market proposed by some commenters is not necessary and would do more harm than good.

Respectfully submitted

A handwritten signature in dark ink, appearing to read 'Art Hubacher', with a long horizontal flourish extending to the right. The signature is positioned above a thin horizontal line.

Art Hubacher  
Managing Partner  
Hubacher & Ames, PLLC  
11350 Random Hills Drive  
Suite 800  
Fairfax, VA 22030

August 22, 2017

## **APPENDIX ONE**

Hubacher & Ames New Build Projects January 2017 through July 2017

(See Attached)

Capitalized Terms Used:

AO = Access Only Contract. No marketing rights included.

NEMA = Non-exclusive marketing agreement.

EMA = Exclusive marketing agreement

Bulk = Bulk Service Contract

**New Build Projects January 2017 through July 2017**

<b>Property Location</b>	<b>Number of Units</b>	<b>Number of Service Providers</b>	<b>Type of Contracts</b>
Seattle, WA	461	4	4 NEMAS
Reston, VA	508	3	2 NEMAS, 1 AO
Menlo Park, CA	183	3	3 NEMAS
Los Angeles, CA	341	3	3 NEMAS
Los Angeles, CA	275	3	3 NEMAS
Los Angeles, CA	300	3	3 NEMAS
Los Angeles, CA	237	3	3 NEMAS
Carlsbad, CA	278	3	3 NEMAS
Seattle, WA	178	3	3 NEMAS
Seattle, WA	164	3	3 NEMAS
Seattle, WA	226	3	3 NEMAS
Milpitas, CA	371	3	3 NEMAS
Portland, OR	385	3	3 NEMAS
Centennial, CO	285	3	1 EMA, 2 AO
Charlotte, NC	286	2	2 NEMAS
San Francisco, CA	545	2	2 NEMAS
Portland, OR	63	2	2 NEMAS
Edinburg, TX	128	2	2 NEMAS
Philadelphia, PA	322	2	1 EMA, 1 AO
Quincy, MA	352	2	1 EMA, 1 AO
Portland, OR	124	2	2 NEMAS
Portland, OR	196	2	2 NEMAS
Denver, CO	161	2	2 NEMAS
Portland, OR	230	2	2 NEMAS
Westminster, CO	320	2	2 NEMAS
Oakland, CA	254	2	2 NEMAS
Fremont, CA	302	2	2 NEMAS
Anaheim, CA	340	2	2 NEMAS
Chicago, IL	444	2	1 EMA, 1 AO
Austin, TX	344	2	2 NEMAS
Petaluma, CA	150	2	2 NEMAS
Long Beach, CA	163	2	2 NEMAS
Long Beach, CA	49	2	2 NEMAS
Long Beach, CA	136	2	2 NEMAS
Northridge, CA	429	2	2 NEMAS
Nashville, TN	258	2	2 NEMAS
Santa Cruz, CA	94	2	2 NEMAS
San Francisco, CA	502	2	1 EMA, 1 AO
Carson, CA	357	2	2 NEMAS
Seattle, WA	155	2	2 NEMAS
Spokane, WA	132	2	1 EMA, 1 AO
Ft. Lauderdale, FL	350	1	1 EMA
Houston, TX	264	1	1 EMA
Miami, FL	309	1	1 EMA
Santa Barbara, CA	74	1	1 EMA
Henderson, NV	360	1	1 EMA
Austin, TX	116 (Student Housing)	1	1 Bulk
Syracuse, NY	166 (Student Housing)	1	1 Bulk
College Station, TX	233 (Student Housing)	1	1 Bulk
Roosevelt Island, NY	352 (Student Housing)	1	1 Bulk
Issaquah, WA	146 (Senior Housing)	1	1 Bulk
Oxnard, CA	136 (Senior Housing)	1	1 Bulk
Colorado Springs, CO	162 (Senior Housing)	1	1 Bulk
Lacey, WA	135 (Senior Housing)	1	1 Bulk
<b>Totals:</b>	<b>55 Properties</b>	<b>12,737 Units</b>	

## **APPENDIX TWO**

Fiber Overbuild Contracts at Existing Assets July, 2016 – July, 2017

(See Attached)

Capitalized Terms Used:

AO = Access Only Contract. No marketing rights included.

NEMA = Non-exclusive marketing agreement.

EMA = Exclusive marketing agreement

**Fiber Overbuild Contracts at Existing Assets July 2016 - July 2017**

	<b>Property Location</b>	<b>Number of Units</b>	<b>Type of Fiber Overbuild Contract</b>	<b>Other Providers with Exclusive Wiring Contracts ?</b>
	Aliso Viejo, CA	590	Access only	Yes
	Aliso Viejo, CA	675	Access only	Yes
	Newport Beach, CA	1,306	Access only	Yes
	Vacaville, CA	312	Access only	Yes
	Spring, TX	192	Access only	Yes
	Houston, TX	148	Access only	Yes
	Charlotte, NC	288	Access only	Yes
	Charlotte, NC	204	Access only	Yes
	Bethesda, MD	360	Access only	Yes
	Kirkland, WA	123	Access only	Yes
	San Mateo, CA	218	Access only	Yes
	Atlanta, GA	287	NEMA	Yes
	John's Creek, GA	227	NEMA	No
	Alpharetta, GA	352	NEMA	Yes
	San Diego, CA	318	NEMA	Yes
	San Jose, CA	456	NEMA	Yes
	Riverside, CA	588	EMA	No
	San Diego, CA	160	NEMA	Yes
	Austin, TX	305	NEMA	Yes
	Dallas, TX	371	NEMA	Yes
	Dallas, TX	331	NEMA	Yes
	Jacksonville Beach, FL	228	NEMA	No
	Los Angeles, CA	243	NEMA	Yes
	Los Angeles, CA	102	NEMA	Yes
	Orlando, FL	212	NEMA	No
	Alpharetta, GA	210	NEMA	Yes
	Pleasanton, CA	100	NEMA	Yes
	Los Angeles, CA	300	NEMA	No
	San Jose, CA	941	NEMA	Yes
	Chicago, IL	198	NEMA	No
	Irving, TX	524	NEMA	No
	Houston, TX	320	EMA	No
	Sacramento, CA	384	EMA	No
	Houston, TX	320	NEMA	Yes
	San Diego, CA	368	NEMA	No
	San Diego, CA	229	NEMA	No
	San Diego, CA	254	NEMA	No
	Daly City, CA	2,983	NEMA	Yes
	Folsom, CA	208	NEMA	Yes
	Folsom, CA	426	EMA	Yes
	San Bruno, CA	437	NEMA	Yes
<b>Totals:</b>	<b>42 Properties</b>	<b>16,798 Units</b>		

**APPENDIX THREE**

**DECLARATION OF KEVIN S. HOTT OF E&S RING MANAGEMENT CORPORATION**

(See Attached)



In the Matter of:	)	
	)	
Improving Competitive Broadband Access	)	
to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	
	)	
	)	

1. I, Kevin Hott, am Director of Information Systems & Technology of E&S Ring Management Corp. ("E&S Ring") located in Los Angeles, California. E&S Ring owns and/or manages 37 apartment home communities (also referred to herein as multi-tenant environments or "MTEs") consisting of 9,005 residential units throughout California and Washington.

3. A large majority of our MTEs are served by more than one service provider. At these MTEs served by multiple providers, E&S Ring has found that our residents have a better experience if each provider has a specific “run” of wiring that it dedicated solely to that provider to deliver service to residential units. In some cases, a provider owns its own wiring or fiber lines that extends to a unit and in other cases the provider uses wiring owned by the owner of the MTE. Our experience is that our residents receive a better level of customer service when providers do not attempt to share wiring. In general, our on-site staff members receive fewer complaints about poor service, unintentional service disconnections, and delayed service installations when service providers can rely on wiring they own or wiring that has been designated for their exclusive use.

4. In contrast, our experiences at MTEs where multiple providers attempt to ride over only one set of wiring have been a mixed bag. This finding has led directly to E&S Ring's decision to make significant investments in wiring and related infrastructure at some of our MTEs in order to allow multiple service providers to function in a more cooperative fashion when they are using wiring on a shared, non-exclusive basis. One of the problems that has surfaced repeatedly is that service providers tend to act in their own best interests when using wiring that these providers neither own nor have a right to use on an exclusive basis. In these shared wiring situations, providers tend to use the wiring as they please without respect to their competition or, more critically, the consumers who live at the MTE.

5. One recent experience brought this issue front and center and we feel that it is worth sharing with the Commission. E&S Ring manages a large MTE in southern California that contains nearly 1,000 residential units. This community has been served by two different service providers for many years. E&S Ring entered contracts with each of these service providers that allowed each provider to use the owner-owned inside wiring on a non-exclusive basis. In 2007, E&S Ring invested approximately \$1.3 million in upgrading the inside wiring at this community, including labeling the inside wiring and installing new "neutral" wiring cabinets to be shared by each of the providers. This investment was made in our effort to improve the overall quality of the broadband services at this MTE and to make it easier for each provider to connect to the inside wiring. We anticipated that our efforts and expenditures would be rewarded by improved cooperation between the two providers in their joint usage of the inside wiring, which would in turn result in better broadband service and improved customer service for our residents.

6. In fact, the opposite occurred. Despite our investment, we found that one of the providers (Provider X) has acted in its own interests and has refused to "play nice in the sandbox" with the other provider (Provider Y). Provider X has treated the owner-owned inside wiring as though it was its own wiring over which it had exclusive dominion and control. This appears to be for economic reasons. Provider X has, on more than one occasion, performed its own unauthorized work to the owner-owned inside wiring and to the owner-installed wiring cabinets. Provider X neither owns nor has an exclusive right to use the wiring or the wiring cabinets. These unauthorized acts include (i) the removal of owner-owned patch panels within the neutral cabinets that were designed specifically to support multiple service providers, (ii) installation of Provider X's own taps inside the new wiring cabinets making it difficult (or impossible) for Provider Y to access the inside wiring, (iii) the removal of labeling from the owner-owned wiring and wiring panels that makes unit identification difficult or impossible, and (iv) the installation of lengthy jumper cables within each wiring cabinet that clearly exceeds the capacity of the cabinet, causing cables to bulge out of the cabinets. These activities by Provider X have compromised the ability of these cabinets to be used by Provider Y, making it difficult -- and in some cases impossible -- for Provider Y to gain access to the inside wiring. These

actions by Provider X certainly appear to be intentional and certainly have had an anti-competitive effect in that Provider Y has had a much harder time getting access to the inside wiring g is at a distinct disadvantage on what should be an even playing field.

7. This has been a repeated and ongoing problem with Provider X at this MTE. After receiving a notification from E&S Ring about this issue in 2016, Provider X visited the MTE to restore the wiring and the new wiring cabinets to the condition E&S Ring had configured them. However, this restorative work was short lived. Within months, a different set of Provider X technicians visited the MTE and did essentially the same thing: performing unauthorized work to the owner-owned inside wiring and wiring cabinets to make it more difficult or impossible for Provider Y to access the inside wiring. In addition, Provider X has caused serious damage to the wiring cabinets that E&S Ring installed as a mechanism to help facilitate the joint use of the inside wiring.

8. E&S Ring is concerned that this gamesmanship regarding the joint use of our inside wiring will lead to very poor experiences for our residents, who are the consumers of these providers' broadband services. This issue still has not been fully resolved as of the date of this Declaration although E&S Ring has been working tirelessly to prevent residents from being impacted. However, we know that additional restorative work is still needed at the MTE in question in order to repair the damage that Provider X has caused. We have been informed that our residents should expect service outages and delayed installation and service appointments when that work takes place. This is something our residents should not have to experience especially in light of the investment we made in an attempt to prevent this precise situation from occurring.

9. Fortunately for E&S Ring, there is a contract in place with Provider X at this MTE. That contract, which was the subject of a free market negotiation, contains protections that have provided E&S Ring with a legal mechanism to force Provider X to stop its anti-competitive antics, repair the damage, and cooperate with Provider Y in the shared used of the inside wiring. While we are still working with Provider X to reach a final resolution, E &S Ring believes that without a contract that specifically sets forth the rights and responsibilities of Provider X with respect to its use of the owner-owned wiring and wiring cabinets, this situation would have been much worse.

10. In light of our experiences, E&S Ring is strongly opposed to any potential rules or regulations that would allow unfettered access to any inside wiring owned by an MTE owner. E&S Ring strongly rejects the idea that providers who are given unfettered access to owner-owned wiring will do so in a cooperative manner that does not lead to disruptions and a poor experience for our residents. E&S Ring finds that to be a naïve, simplistic concept that may

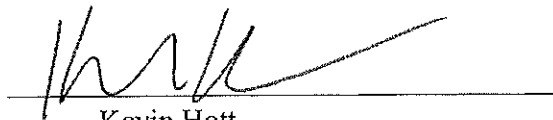
sound egalitarian but is flawed in the real world. As our experience shows, service providers do NOT willingly cooperate with each other in these shared wiring situations.

11. For many reasons - most importantly the quality of the services received by the consumer - E&S Ring believes the use of owner-owned wiring should be subject to free market negotiations between the MTE owner and the service provider. That is the only way to ensure that consumers - our residents - will not be negatively affected by a wild west approach to inside wiring where all providers have unfettered access to inside wiring but no provider takes responsibility for it. Even in the unfortunate situation we are experiencing at our large MTE in southern California, our residents have so far been spared any terrible consequences precisely because we had an enforceable contract with Provider X. That contract and E&S Ring's enforcement of it has, to date, alleviated what could otherwise be a terrible situation for our residents. We strongly believe our residents by now would have experienced service disruptions and an inability to exercise their choice of providers had we not been able to keep Provider X "honest" through enforceable contractual provisions pertaining to the use and maintenance of the owner-owned inside wiring.

12. E&S Ring believe that the current approach to MTE wiring use - allowing the free market to dictate wiring arrangements - has proven an effective way for both the MTE owner and service providers to provide MTE residents with choice in service providers while at the same time ensuring that MTE wiring is properly maintained, used and repaired. A government-mandated MTE wiring sharing arrangement would be detrimental to both goals.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on August 18, 2017



Kevin Hott